

[Cite as *State ex rel. Jerningham v. Russo*, 2010-Ohio-5377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95573

**STATE OF OHIO, EX REL.
TOMMIE JERNINGHAN**

RELATOR

VS.

MICHAEL RUSSO, JUDGE

RESPONDENT

**JUDGMENT:
COMPLAINT DISMISSED**

Writ of Mandamus
Motion No. 437566
Order No. 438484

RELEASE DATE: November 2, 2010

FOR RELATOR

Tommie Jerninghan, pro se
Inmate No. 592-294
Lorain Correctional Institution
2075 South Avon Beldon Rd.
Grafton, Ohio 44044

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA A. BLACKMON, J.:

{¶ 1} Relator, Tommie Jerninghan, Jr., requests that this court compel respondent judge to dispose of his motion to withdraw guilty plea filed in *State v. Jerninghan*, Cuyahoga County Court of Common Pleas Case No. CR-537831 on June 23, 2010. Jerninghan complains that the information on the indictment in Case No. CR-537831 does not conform to the requisite statutory elements of the crime charged – breaking and entering, R.C. 2911.13(B).

{¶ 2} Respondent has filed a motion to dismiss and argues, inter alia, that Jerningham's action is not ripe. "An action in mandamus seeking to compel a court to rule on a motion is premature if the complaint [is] filed fewer than 120 days after the filing of the motion. See Sup.R. 40(A)(3); *State ex rel. Barksdale v. Sutula*, Cuyahoga App. No. 93861, 2009-Ohio-4885." *State ex rel. Hondo v. McGinty*, Cuyahoga App. No. 94915, 2010-Ohio-2900. Jerningham filed this action on August 19, 2010, fewer than 60 days after the filing of his motion to withdraw guilty plea on June 23, 2010. Additionally, respondent argues that relief in mandamus does not lie to challenge the validity or sufficiency of an indictment and that appeal is an adequate remedy. See *State ex rel. Dix v. McAllister*, 81 Ohio St.3d 107, 108, 1998-Ohio-646, 689 N.E.2d 561.

{¶ 3} Jerningham has filed a brief in opposition to the motion. Although he acknowledges that this action is premature, he asserts that he is entitled to immediate release. He has not, however, provided this court with any basis for relief in habeas corpus.

{¶ 4} The complaint in this action does not, therefore, state a claim upon which relief can be granted. Rather, we note that the docket in Case No. CR-537831 reflects that respondent issued a sentencing entry on September 24, 2010 and that Jerningham commenced an appeal on October 6,

2010. The docket also reflects that respondent denied Jerningham’s motion to vacate plea in entries received for filing on September 24, 2010 and September 29, 2010. As noted above, Jerningham may assert his challenge to the sufficiency of the indictment on direct appeal.

{¶ 5} Defects in Jerningham’s complaint and supporting documentation also require dismissal. He has not attached an affidavit describing each civil action or appeal filed within the previous five years in any state or federal court. His failure to comply with R.C. 2969.25 requires the dismissal of his complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998 Ohio 218, 696 N.E.2d 594; *Alford v. Winters*, 80 Ohio St.3d 285, 1997 Ohio 117, 685 N.E.2d 1242. Additionally, Loc.App.R. 45(B)(1)(a) requires that the relator in an original action support the complaint with an affidavit specifying the details of the claim. The affidavit must also be notarized. *State ex rel. McGrath v. McDonnell*, Cuyahoga App. No. 87368, 2006-Ohio-535. Jerningham’s “Verifications” are not notarized and, therefore, fail to comply with R.C. 2969.25 and Loc.App.R. 45(B)(1)(a).

{¶ 6} Jerningham asserts, however, that this court should not require an affidavit because notary services are not available to him in the Cuyahoga County Jail. He has not, however, provided this court with any controlling authority which exempts him from the requirement that he provide notarized

affidavits. See *State ex rel. Nash v. Donnelly*, Cuyahoga App. No. 95497, 2010-Ohio-4370.

{¶ 7} Accordingly, respondent's motion to dismiss is granted. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Complaint dismissed.

PATRICIA A. BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
JAMES J. SWEENEY, J., CONCUR